IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34322

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 729**
	)	
Plaintiff-Respondent,	)	**Filed: December 5, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
ROBERT D. WITMOR,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Order denying motion to suppress evidence, reversed in part, affirmed in part and case remanded.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Robert D. Witmor appeals, challenging the denial of his motion to suppress. For the reasons set forth below, we reverse in part, affirm in part and remand.

I.
BACKGROUND

Robert D. Witmor moved into his daughter's house in Idaho while he was looking for work. Witmor was provided a bedroom in the basement. Witmor's daughter also put her personal home computer in his bedroom so that he would be able to communicate with his wife in Uruguay using instant messaging. Witmor's daughter used the personal computer in Witmor's room for work projects and e-mail. On August 15, 2006, Witmor gave his daughter permission to use the computer and left her alone in the room. When she sat down at the computer she saw an open program running in the task bar at the bottom of the screen. There were also two text

documents open on the screen, in small boxes, so that multiple items were visible all at once. Upon reading the text documents, Witmor's daughter discovered that they were stories about sexual activity with children, including molestation and incest. When she opened the program running in the task bar, Witmor's daughter discovered files of text and photographs. She viewed only a few photos, all of which were of young children in sexually explicit poses. One photo showed an eleven-year-old girl and an eight-year-old boy engaged in sexual intercourse.

Witmor's daughter confronted him about the photos and documents on her computer. He insisted that it was for research purposes only; he was trying to understand how pedophiles could be attracted to children. When his daughter was adamant that the material was not appropriate, Witmor began to delete the files from the computer. Still distraught, Witmor's daughter left the house to call police. She met with Officer Joshua Schneider of the Coeur d'Alene police department and explained the situation to him. Witmor's daughter gave Officer Schneider permission to enter her home to speak with Witmor. Officer Schneider was accompanied by Officer Walther, his training officer, and Lieutenant Dixon, who was called in for backup due to the presence of a firearm in the home. As the officers proceeded down the stairs to the basement, they identified themselves to Witmor and asked to speak with him. All four men gathered in a common area in the basement. The officers directed Witmor to sit in a chair, while they remained standing, approximately five to six feet from him. When Witmor indicated his intention to use the bathroom, the officers instructed him to remain sitting. Although Officer Schneider explained later that this was for officer safety reasons, as the location of the firearm was not known to them, this explanation was not given to Witmor at the time. Without giving Witmor any *Miranda*[1] warnings, Officer Schneider asked Witmor a short series of questions.[2]

Officer Schneider:	Do you know why we're here?
Witmor:	Probably because my daughter is overreacting.
Officer Schneider:	About what?
Witmor:	I've been looking at pornography involving people of all ages. It was for research.
Officer Schneider:	What do you mean by all ages? How old are the people in the pictures?

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] No part of the interview in the basement was recorded by any of the officers. Therefore, the questions and answers are related according to the recollection of Officer Schneider. Witmor does not contest the accuracy of that recollection.

Witmor:	Forty to fifty and all the way down.
Officer Schneider:	How far are we talking about? Children, or what?
Witmor:	Pictures of nude children.

At this point Officer Schneider ceased asking Witmor questions and read him his *Miranda* rights from a pre-printed card he carried in his pocket. After reading the list of rights, Officer Schneider asked Witmor if he understood his rights. Witmor responded affirmatively, and then continued to explain himself to the officers before the officers could ask more questions. In doing so, he made many incriminating statements. At the conclusion of the interview, Officer Schneider placed Witmor under arrest for possession of sexually exploitative material, I.C. §§ 18-1507, 18-1507A. Witmor was also later charged with destruction of evidence, I.C. § 18-2603.

Witmor moved to suppress his statements to the officers on the basis that he was not given his *Miranda* warnings prior to Officer Schneider's first question. The district court denied the motion, concluding that while Witmor was in custody because he could not have felt free to leave, the first four questions Officer Schneider asked were not an interrogation, but rather constituted a pre-interrogation beginning dialogue. The court reasoned that since there was no illegal interrogation prior to *Miranda*, there was no basis to suppress the post-*Miranda* statements as fruit of the poisonous tree. Witmor entered into a conditional Rule 11 plea agreement in which the state dismissed the destruction of evidence charge, and Witmor pled guilty to possession of sexually exploitative material while reserving his right to appeal the denial of his motion to suppress. This appeal followed.

II.
STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999). Where, as here, the facts are not in dispute, we freely review the

application of constitutional standards to those facts. *State v. Silva*, 134 Idaho 848, 854, 11 P.3d 44, 50 (Ct. App. 2000).

III.
DISCUSSION

In *Miranda*, the United States Supreme Court held that police must inform individuals of their right to remain silent and their right to counsel, either retained or appointed, before police undertake a custodial interrogation. These warnings were deemed necessary as a prophylactic measure to secure Fifth Amendment rights because "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. Only those statements made without *Miranda* warnings during custodial interrogation are inadmissible in the prosecution's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 317 (1985). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

Witmor agrees with the district court's ruling that he was in custody at the time of questioning, but challenges the court's conclusion that he was not interrogated. The state, on the other hand, challenges whether Witmor was in custody at the time of questioning. The state concedes that Witmor was subject to express questioning, which constitutes interrogation. Therefore, the only issue before us is whether Witmor was in custody at the time of the interrogation. The United States Supreme Court, in *California v. Beheler*, 463 U.S. 1121, 1125 (1983), explained that custody, for purposes of the *Miranda* requirement, turns on whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *See also State v. Doe*, 137 Idaho 519, 523, 50 P.3d 1014, 1018 (2002). This standard is an objective test--whether a reasonable person would believe he or she was in police custody to a degree associated with formal arrest, not whether the person would believe he or she was not free to leave. *Silva*, 134 Idaho at 854, 11 P.3d at 50; *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The subjective impressions in the minds of either the person being questioned or the law enforcement officer are not relevant to the inquiry. *State v. Frank*, 133 Idaho 364, 369, 986 P.2d 1030, 1035 (Ct. App. 1999). On review, the court looks to the totality of the circumstances,

including the location of the interrogation, the conduct of the officers, the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Albaugh***,** 133 Idaho 587, 591, 990 P.2d 753, 757 (Ct. App. 1999); *State v. Medrano,* 123 Idaho 114, 117-18, 844 P.2d 1364, 1367-68 (Ct. App. 1992).

Witmor had not been formally arrested when Officer Schneider asked the first four questions; however, he was in custody for *Miranda* purposes.[3] The *Miranda* court was deeply concerned with the effect of an incommunicado, police-dominated atmosphere on a criminal suspect's will to resist self-incrimination during interrogation. *Miranda,* 384 U.S. at 451; *United States v. Griffin*, 922 F.2d 1343, 1352 (8th Cir. 1990). Although the *Miranda* court focused on stationhouse interrogations, the fact that Witmor was interrogated in his home is not dispositive. *See Griffin*, 922 F.2d at 1348. A suspect questioned at home may be in custody under certain circumstances. *Orozco v. Texas,* 394 U.S. 324 (1969); *Griffin*, 922 F.2d at 1356.

Witmor did not instigate contact with the officers; rather they entered the home where he was staying and sought him out. He first encountered the three officers in the basement, in a common area outside his bedroom. He was directed to sit down in a chair, while the three officers remained standing. Officer Schneider indicated that he was there to speak with Witmor and informed him that he was not allowed to use the bathroom, effectively restricting him to the chair. Witmor was not instructed that he was free to ask the officers to leave or that he was not under arrest. Although a very short amount of time was needed to ask and receive answers to the first four questions, none of the other residents of the house were in the basement with Witmor and the three uniformed police officers. While *Miranda* was more obviously concerned with prolonged questioning, custody can be found in relatively brief interrogations where "the detainee is aware that questioning will continue until he provides his interrogators the answers they seek." *Berkemer,* 468 U.S. at 437; *Griffin*, 922 F.2d at 1348-49. Witmor's daughter had informed him she was going to call the police; he knew why the officers were there; and the

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[3] The district court determined that Witmor was in custody for *Miranda* purposes, although it did so by looking at whether a reasonable person would have felt free to leave. This is a Fourth Amendment standard to determine when a person has been detained, not to define when a person has been arrested. It is not applicable to Fifth Amendment *Miranda* analysis. However, where a ruling in a criminal case is correct, though based upon an incorrect reason, it still may be sustained upon the proper legal theory. *State v. Pierce*, 107 Idaho 96, 102, 685 P.2d 837, 843 (Ct. App. 1984).

officers knew that Witmor had been in possession of explicit pictures of children. The officers were not leaving until they obtained Witmor's version of events. Additionally, Witmor was not free to move about the room or to leave the room to use the bathroom. Although this restriction on physical movement was purportedly for officer safety, the reason for the restriction was not communicated to Witmor. A reasonable man in Witmor's position would have understood that he was in custody as soon as the police began to question him. *Cf. State v. Loosli*, 130 Idaho 398, 398-99, 941 P.2d 1299, 1299-1300 (1997) (concluding that Loosli was not in custody even though he was questioned at the police station because he came to talk with officers voluntarily and was informed multiple times that he was free to leave at the end of the interview). Witmor was subject to custodial interrogation prior to being advised of his *Miranda* rights.

Witmor further argues that any post-*Miranda* statements are fruit of the poisonous tree based on the pre-*Miranda* violation of his Fifth Amendment rights. However, this is not the proper framework for analyzing the impact of *Miranda* on statements made after receiving the warnings. The United States Supreme Court declared that "the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309. "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Id.* at 310. However, a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. The relevant inquiry, therefore, is whether the second statement was voluntarily made, considering the surrounding circumstances and the entire course of police conduct. *Id.* at 318. In *Elstad*, the Court concluded that the post-*Miranda* statements were voluntary and admissible. Of particular significance were the passage of time--an hour passed between the first statements and the subsequent post-*Miranda* questioning; the change in location--the officers and Elstad had moved from Elstad's home to the police station; and that the brief questioning at Elstad's home was not intended to elicit incriminating responses but resulted because officers paused to speak with Elstad's mother before taking him to the police station. *Id.* at 300-01.

Nearly twenty years after *Elstad*, the Supreme Court again addressed the issue of the voluntariness of a post-*Miranda* statement in *Missouri v. Seibert*, 542 U.S. 601 (2004). In that

case, officers interrogated Seibert at the police station for thirty to forty minutes without advising her of her *Miranda* rights. After she confessed, officers left her alone for twenty minutes before returning to the interrogation room, starting a tape recorder, and reading her the *Miranda* warnings. Seibert again confessed, with officers prompting her using her pre-*Miranda* statements. *Id.* at 604-05. The inquiry then became whether "the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Id.* at 611-12; *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Seibert, 542 U.S. at 611-12. When a suspect's pre-*Miranda* confession is compelled by a police-dominated interrogation, the subsequent warnings would hardly lead to the conclusion that "he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.* at 613. The Court concluded that Seibert's post-*Miranda* statements were not voluntary due to the coercion inherent in her pre-*Miranda* statements and the ineffectiveness of the *Miranda* warnings. *Id.* at 615.

The case at hand is far more similar to *Elstad* than it is to *Seibert*. Officer Schneider did not actively coerce Witmor into confessing the quantity and quality of exploitative material he had in his possession. The first four questions, though an interrogation, were not the relentless interrogation with which *Miranda* was concerned. Although there was not a significant break in time or location between the unwarned, and therefore inadmissible statements, and the subsequent administration of *Miranda* warnings, the lack of detail established in the first four statements could hardly lead Witmor to the conclusion that he had already come too far to stop talking at that point. *See Seibert*, 542 U.S. at 613. Witmor informed officers that he had been doing research by looking at pornography that included pictures of nude children. Officer Schneider immediately informed Witmor of his *Miranda* rights and asked Witmor if he understood those rights. Witmor responded affirmatively and then, without any further question

being asked, continued to explain himself to the officers. Although Witmor was still in custody in a police-dominated atmosphere, the fact that he continued to speak with the officers after being informed of his rights is probative. *Elstad*, 470 U.S. at 318. Witmor's post-*Miranda* statements were voluntarily made to police after being fully informed of his rights.

IV.

CONCLUSION

Witmor was interrogated by Officer Schneider while in custody, and without being advised of his *Miranda* rights. However, the initial *Miranda* violation did not render Witmor's subsequent post-*Miranda* statements involuntary. Accordingly, we reverse in part and affirm in part the order denying the motion to suppress evidence and remand for further proceedings.

Judge LANSING and Judge PERRY **CONCUR**.